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# Civil Procedure: Distinguishing First Amendement Issues for Purposes of Res Judicata--A Problem in Semantics

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## Civil Procedure: Distinguishing First Amendment Issues for Purposes of Res Judicata— A Problem in Semantics

Appellants were arrested for distributing political pamphlets in Central Park without first obtaining the permit required by section 13 of the New York City park rules.[1] They were convicted in a consolidated proceeding before the Criminal Court of the County of New York and sentenced to pay a fine of ten dollars or spend two days in jail. After appellants paid the fine, their convictions were affirmed without opinion by the Appellate Term, and their application for leave to appeal to the New York Court of Appeals was denied. Electing not to petition the United States Supreme Court for a writ of certiorari, appellants brought a civil rights action[2] in federal district court against the city and several individual city officials, seeking a declaratory judgment that section 13 and the permit dispensing system[3] violated their

1. Section 13 of the park rules states:

> No person shall hold any meeting, perform any ceremony, make an address, exhibit or distribute any sign, placard, declaration or appeal of any description, in any park or park-street, except by permit from Parks, Recreation and Cultural Affairs Administration. Upon application, the Administrator shall issue such permit unless: (1) the use for which the permit is sought would substantially interfere with park use and enjoyment by the public; (2) the location selected is not suitable because of special landscaping and planning; (3) the location is not suitable because it is a specialized area including, but not limited to, a zoo, swimming pool, or skating rink; (4) the date and time requested have previously been allotted by permit. Whenever a permit is denied, alternative suitable locations and dates shall be offered to the applicant.

NEW YORK CITY PARK RULES AND REGULATIONS § 11(a), quoted in Parties' Joint Appendix on Appeal at A-14. Section 13 had been construed by the state courts to apply to the distribution of pamphlets. *See* Thistlethwaite v. City of New York, 497 F.2d 339, 343 n.2 (2d Cir. 1974) (dissenting opinion). The New York City Charter authorizes the Administration to promulgate and enforce rules and regulations for the parks and further provides that any violation of the rules shall constitute a criminal offense. NEW YORK, N.Y., CITY CHARTER ANN. § 2003(2)(j) (1972).

2. The action was brought pursuant to 42 U.S.C. § 1983 (1970).

3. Section 11(a) of the park rules, the basic regulation governing the permit dispensing system, provides in pertinent part:

> A permit may be granted upon such terms and conditions as the Administrator shall reasonably impose. Every permit shall be of a duration reasonably deemed appropriate by the Administrator for the use of the park and its facilities by the public. The Administrator shall prescribe and make readily available forms of application for permits and copies of the Rules and Regulations in force.

NEW YORK CITY PARK RULES AND REGULATIONS § 11(a), quoted in Parties'

first amendment rights and an injunction prohibiting further enforcement of section 13 against them. The district court dismissed the complaint on the ground that the appellants had fully litigated the claim in the state criminal proceeding.[4] Affirming the dismissal, the court of appeals *held* that appellants' suit was barred by res judicata because the issues had already been litigated and determined against them in the state court. *Thistlethwaite v. City of New York*, 497 F.2d 339 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3355 (Dec. 24, 1974).[5]

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Joint Appendix on Appeal at A-13. The Administrator had implemented this section by promulgating permit application forms incorporating the following paragraphs:

> [Paragraph 4] It is prohibited to distribute . . . any pamphlets, handbills, placards, signs or any other appeals . . . within any park or on any park street.
>
> . . . .
>
> [Paragraph 9] The permit . . . is revocable at any time in the absolute discretion of the Commissioner.

497 F.2d at 344 n.4.

4. Thistlethwaite v. City of New York, 362 F. Supp. 88 (S.D.N.Y. 1973).

5. The court also held that (1) it was not impelled by the policies of section 1983 to deny traditional full faith and credit to the state judgment, and (2) since the appellants had apparently *elected* to litigate the constitutional issues in state court, it was unnecessary to decide squarely whether a defendant's need to assert constitutional defenses in a state criminal proceeding should cause a federal court to apply res judicata principles less extensively in a subsequent civil rights suit.

Although resolution of the first issue has important implications for the future of judicial federalism, the Supreme Court has thus far refused to consider it, *see* Florida State Bd. of Dentistry v. Mack, 401 U.S. 960 (1971) (White, J., dissenting from denial of certiorari); in the absence of guidance, the lower courts have adhered to the traditional rule that state court judgments are entitled to full faith and credit in the federal courts. *See, e.g.*, Williams v. Liberty, 461 F.2d 325, 327 (7th Cir. 1972); Metros v. United States Dist. Court for Dist. of Colo., 441 F.2d 313, 316-18 (10th Cir. 1970); Kauffman v. Moss, 420 F.2d 1270, 1273-74 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970); Vestal, *State Court Judgment as Preclusive in Section 1983 Litigation in a Federal Court*, 27 OKLA. L. REV. 185 (1974). One commentator has recently argued for the substantial abrogation of the full faith and credit principle when res judicata problems arise in section 1983 suits. McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims* (pt. 2), 60 VA. L. REV. 250 (1974). Although the Burger Court seems strongly inclined to allow state courts to assume responsibility for the protection of federal constitutional rights in state criminal proceedings, Steffel v. Thompson, 415 U.S. 452 (1974); Younger v. Harris, 401 U.S. 37 (1971), the *Younger* abstention cases do not speak directly to the propriety of federal cognizance *after* the state criminal proceeding has run its course. At that point, principles of res judicata and federalism may be subordinated to the policies of federal habeas corpus, 28 U.S.C. § 2254 (1970), which provides an avenue for relitigating constitutional issues in federal court. Brown v. Allen, 344 U.S. 443 (1953). *See also* Kaufman v. United States, 394 U.S. 217 (1969) (federal prisoner). Relitigation pursuant to

"Res judicata" is the general term used to describe the binding effect of a judgment in one action upon a party who subsequently becomes involved in another action concerning closely related matters.[6] The two branches of the res judicata doctrine have commonly been called merger and bar,[7] and collateral estoppel,[8] but one commentator has suggested the more descriptive

section 1983 jurisdiction, however, would seem to represent a somewhat greater strain on federal-state comity, at least to the extent that section 1983 is not subject to the unique historical considerations and doctrinal limitations associated with habeas corpus. *See generally* Preiser v. Rodriguez, 411 U.S. 475 (1973); Fay v. Noia, 372 U.S. 391 (1963); Rosenberg v. Martin, 478 F.2d 520 (2d Cir.), *cert. denied*, 414 U.S. 872 (1973).

Addressing itself briefly to the second issue, the court failed to examine the significance of the lack of an opportunity to elect a federal forum, but instead focused on very dubious evidence of election of the state forum in order to avoid the issue. 497 F.2d at 342-43, 344 n.6 (dissenting opinion). McCormack suggests that great weight should generally be given to the factor of election of forum when considering whether a litigant should be allowed to relitigate an issue of federal civil rights in a federal forum. McCormack, *supra*, at 274-75. Prior case law, however, does not illuminate the significance of the fact that a criminal defendant has no opportunity to elect the forum in which he is tried. In the context of section 1983 litigation, the election problem initially arose when a plaintiff brought a civil rights action without giving a state forum an opportunity to decide an unsettled question of state law, *see* Monroe v. Pape, 365 U.S. 167 (1961), and the federal court chose to abstain and remit the plaintiff to the state court under the abstention doctrine announced in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). If the state court not only resolved the unsettled issues of state law but also decided the federal constitutional issues, the question arose whether the plaintiff was barred under res judicata principles from returning to the federal court. Such a result seemed unfair, since the plaintiff had been forced into state court despite his initial choice of a federal forum. In England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964), the Court resolved this issue, essentially a problem in the judicial administration of the abstention doctrine, by holding that the plaintiff could return to the federal court unless he had in fact clearly and explicitly *elected* to have the state court decide the federal issues. On the other hand, in the context of a state criminal proceeding, as in *Thistlethwaite*, the civil rights plaintiff obviously does not make the initial choice of forum. In fact, if he tries to circumvent the state criminal proceedings, he will meet with another abstention rule prohibiting interference with already commenced criminal proceedings. *See* Steffel v. Thompson, *supra*; Younger v. Harris, *supra*. Thus, it seems that the *Thistlethwaite* court was justified in its uncertainty over the applicability of the election doctrine to prior state criminal proceedings.

6. *See, e.g.*, Commissioner v. Sunnen, 333 U.S. 591, 597-98 (1948); J.E. Bernard & Co. v. United States, 324 F. Supp. 496, 497 (Cust. Ct. 1971); F. JAMES, CIVIL PROCEDURE § 11.9, at 549 (1965) [hereinafter cited as JAMES]; 1B J. MOORE, FEDERAL PRACTICE ¶ 0.405[1] (2d ed. 1974).

7. The terms "merger" and "bar" refer to the two possible effects of a judgment on the merits upon a subsequent action involving essentially the same parties and the same claim. *See* JAMES § 11.9, at 550.

8. Collateral estoppel operates to prevent one or more of the parties to a prior suit from relitigating in a subsequent action any of the

terms "preclusion," "claim preclusion," and "issue preclusion" for the general doctrine and its respective branches.[9]

The *Thistlethwaite* majority held that the civil rights claim was precluded because the state court had previously determined that the basic section 13 permit requirement and the accompanying permit dispensing system were constitutional both facially and as applied to appellants;[10] thus, all the first amendment issues raised by appellants had been decided against them in the state court.[11] The appealing simplicity of the majority's application of preclusion principles was rejected by dissenting Judge Oakes, who argued that the constitutionality of section 13, as *implemented* by section 11(a) of the regulations and paragraphs 4 and 9 of the permit application form, and the constitutionality of those provisions as applied to the appellants were analytically distinct issues asserted for the first time in the federal action.[12] Litigation of these issues therefore appeared to him to be permissible under the recognized rules of issue preclusion.[13] Although the *Thistlethwaite* majority apparently embraced the concept of a distinction between "facial" and "as applied" review,[14] it failed to consider clearly the application of the distinc-

issues necessarily resolved in the first suit. Cromwell v. County of Sac, 94 U.S. 351, 353 (1876). To determine whether the new action involves an attempt to relitigate a previously decided issue, courts generally examine the pleadings and, if necessary, the record in the prior proceeding. *See, e.g.*, Kauffman v. Moss, 420 F.2d 1270, 1274 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970).

9. *See* Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U.L.J. 29 (1964); Vestal & Coughenour, *Preclusion/Res Judicata Variables: Criminal Prosecutions*, 19 VAND. L. REV. 683 (1966).

10. A law is evaluated "on its face" to determine whether there are any circumstances in which it might, if enforced literally according to its terms, prohibit or restrict conduct beyond the extent necessary to further some legitimate legislative purpose. Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); United States v. Spector, 343 U.S. 169, 171 (1952); Federation of Labor v. McAdory, 325 U.S. 450, 460 (1945). In contrast to a "facial" attack, an "as applied" inquiry focuses not on abstract possibilities, but on the actual application of the law to a particular factual situation. *Cf.* Solesbee v. Balkom, 339 U.S. 9 (1950). *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

11. 497 F.2d at 341-42.

12. *Id.* at 344 & n.6. Judge Oakes applied issue rather than claim preclusion. *See* note 35 *infra* and accompanying text.

13. 497 F.2d at 343. One who seeks preclusion of an issue must show that the issue was actually litigated and determined and that the determination was necessary to the result in the prior action. Exhibitors Poster Exch., Inc. v. National Screen Serv. Corp., 421 F.2d 1313, 1319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); Palma v. Powers, 295 F. Supp. 924, 934 (N.D. Ill. 1969); JAMES § 11.18, at 576.

14. 497 F.2d at 341.

tion to the specific facts and issues in *Thistlethwaite*. While Judge Oakes offered a considerably more incisive analysis, he perhaps failed to expose completely the semantic imprecision in the majority opinion. This imprecision can be more convincingly demonstrated by a systematic examination of the first amendment issues associated with each of four modes in which section 13 might formally have been challenged in state court: (1) on its face, (2) as applied to appellants, (3) as "implemented" by section 11(a) of the regulations and paragraphs 4 and 9 of the permit application form, and (4) as so "implemented" and applied to appellants. Such an examination clarifies important distinctions among the issues by approaching each mode of attack in functional terms: an effective inquiry should focus both on the relevant evidentiary facts tending to support a holding of unconstitutionality and on the consequences of such a holding.[15]

Determination of the facial validity of section 13, the first mode of inquiry, would raise the issue whether the city may constitutionally require a permit to distribute leaflets in the park.[16] Such a determination would turn on questions of the legitimacy of the legislative purpose and the existence of a definite and objective relationship between the legislative purpose and the permit requirement.[17] A decision by the state court that section 13 was facially unconstitutional would have compelled the city either to draft an acceptable permit requirement or to employ some other regulatory method less restrictive than a permit

15. Although the conventional preclusion tests focus only on evidentiary facts, *see* note 8 *supra* & note 38 *infra*, in the first amendment context, inquiry into consequences serves to illuminate further the significance of different evidentiary facts.

16. 497 F.2d at 344 (dissenting opinion). On motion by the appellants to dismiss the charges in the state trial court, the following exchange occurred:

> *Mr. Olasov*: Our contention is that the Parks Department may not promulgate regulations restricting the right of individuals such as [the appellants] to distribute leaflets.
>
> Now, we have no doubt at all that there are other regulations that the Parks Department could promulgate . . . .
>
> *The Court*: I'm confining myself and I ask you to confine yourself to Section 13, just 13.
>
> You contend that that violates their constitutional rights?
>
> *Mr. Olasov*: Yes, sir.
>
> . . . .
>
> *The Court*: My decision right now is going to be that I deny your motion on that ground, and I hold that the Parks Department has the right to make rules and regulations with regard to conduct, more specifically with regard to Section 13.

Parties' Joint Appendix on Appeal at A-29.

17. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).

system. Since this initial determination was clearly necessary to the state conviction, preclusion of the issue was appropriate.

The issue raised under the second mode of attack, the validity of section 13 *as applied* to appellants, seems also to have been decided in the state proceeding. In denying the appellants' motion to dismiss the prosecution, the state court apparently rejected their argument that, because they had distributed pamphlets by themselves rather than as members of a sizable group and thus did not create any of the dangers of disruption at which the regulations were aimed, section 13 was unconstitutional as applied to them.[18] If the decision on this issue had been in appellants' favor, the *general* validity of the section 13 permit requirement would not have been affected, but the city would have been placed on notice that the permit requirement could not be enforced against the appellants or any other lone distributors of handbills.[19]

The majority apparently refused to address itself to the distinct first amendment issue raised under the third mode of attack.[20] Judge Oakes, on the other hand, protested:

> But here appellants contest the constitutionality of § 13 as implemented by § 11(a) and the provisions of the permit application which, taken together, facially appear to prohibit *any* distribution of pamphlets or handbills in parks . . . .[21]

Although it is unlikely that he would have met with any greater success, Judge Oakes could have carried his observation one step further by noting that a decision that the language[22] cumulatively granted too much discretion to the responsible officials *would not have affected the validity of section 13*, but instead would have compelled the city to implement section 13 with a facially acceptable permit dispensing system by promulgating a new dispensing regulation and a new application form. It is

18. A law regulating a certain type of conduct or class of persons can be attacked as applied on the ground that the circumstances of the particular person to whom the law has been applied are so different from others in the regulated class that enforcement in such circumstances is outside the original purpose of the law. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153-54 (1938). This same attack could be mounted before the law is actually applied and would then appear in the guise of a challenge for facial overbreadth. *See* Note, *supra* note 10. Thus, the distinction between facial and as applied attack is by no means absolute.

19. *See* Note, *supra* note 10, at 845.

20. *See* 497 F.2d at 341 ("A perusal of the briefs submitted to the Appellate Term cannot fail to convince that the whole regulatory system was assailed . . . .").

21. *Id.* at 344.

22. *See* notes 1 and 3 *supra*.

doubtful that this issue had been litigated in the state criminal proceeding; the scope of the original dispute would naturally have been limited to whether appellants, who did not know that a permit was necessary, could be convicted for distributing literature without obtaining one. If the federal court was indeed unsure whether this issue had previously been litigated, then it should have considered the issue, because appellees had not met their burden of proof on the question of preclusion.[23]

Finally, in the fourth mode of attack, appellants might have asserted in state court that section 11(a) of the regulations and paragraphs 4 and 9 of the permit application form were being unconstitutionally applied by city officials to deny permits.[24] Even if all the regulations were facially valid, the officials may have been denying permits for reasons other than those authorized in section 13.[25] A determination of this issue thus would have entailed a factual inquiry into the actual exercise of discretion by the responsible officials. A decision that the officials were unconstitutionally "censoring" permit applicants would not have affected the facial validity of either section 13 or section 11(a), but would instead have advised the city that the regulatory scheme would be unenforceable to the extent it was administered unconstitutionally. In order to provide a more adequate remedy, a court in such a case could issue an injunction against further abuse of administrative authority, thereby threatening the responsible officials with contempt of court proceedings should they continue to deny permits arbitrarily.[26] In fact, the appellants in *Thistlethwaite* had not attempted to obtain a permit until *after* the last state appeal of their conviction.[27]

23. The litigant who seeks to benefit from issue preclusion has the burden of proof that the issue is precluded by a prior judgment. Kauffman v. Moss, 420 F.2d 1270, 1274 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970).

24. Raising this issue of constitutionality in district court, appellants' amended complaint stated that, under the authority of certain park officials, "permits to distribute pamphlets . . . within any park . . . of the City, purportedly required by Section 13 of the Rules and Regulations, have not been, and are not being, issued by the Administration." Parties' Joint Appendix on Appeal at A-7.

25. *See* 497 F.2d at 344 n.6 (dissenting opinion).

26. *See* Swift & Co. v. United States, 276 U.S. 311, 326 (1928); Lance v. Plummer, 353 F.2d 585 (5th Cir. 1965), *cert. denied*, 384 U.S. 929 (1966).

27. The district court had apparently suggested that one of the appellants apply for a permit before their motion for preliminary injunctive relief was heard. Parties' Joint Appendix on Appeal at A-50 to A-51. After some delay, one appellant submitted his permit application and told the official that he wished to distribute leaflets in Central Park. He

Therefore, the validity of the actual application of section 11(a) and paragraphs 4 and 9 specifically to the appellants could not possibly have been at issue in the state court.[28]

Thus, the issues raised under the third and fourth modes of attack are distinct from the issue of the validity of section 13 either on its face or as applied. According to the principles of issue preclusion, appellants should not have been precluded from litigating these two issues in the federal civil rights action.

An alternative justification for the majority result is that it was proper to apply principles of *claim* preclusion.[29] Unlike issue preclusion, claim preclusion prevents a matter from being litigated even though it was not actually put in issue and determined in the first action if it *should* have been considered as an aspect of the prior claim.[30] It is not totally clear from the majority opinion, however, whether the court intended to apply claim preclusion. At one point the majority indicated that it was applying "the rules of collateral estoppel," or issue preclusion;[31] yet, at another point, it stated that "the *gist* of the current suit is that the regulations are unconstitutional,"[32] thereby suggesting a concern with the general scope of the prior claim and an application of claim preclusion.[33] Since the majority never explicitly indicated that any issue was precluded because it *should* have been tried in the prior suit,[34] it seems on the whole more probable

later described to the district court what transpired: "And he said 'Nothing doing'. And he turned the leaflet over . . . and he said, 'Well, number four [paragraph 4 of the permit application] says there is—you are not allowed to distribute leaflets in the park.'" Parties' Joint Appendix on Appeal at A-53. *See* notes 1 and 3 *supra*. *See also* 497 F.2d at 344 n.6 (dissenting opinion).

28. *See id.* at 343 n.3 (dissenting opinion).

29. The district court had based its holding upon claim preclusion, stating that "[t]he aspects now cited as additional are inherent in the arguments presented to the state court and, in any event, *res judicata* precludes relitigation of any aspect of the claim." 362 F. Supp. at 94.

30. Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1876).

31. 497 F.2d at 342. *See also* note 20 *supra*.

32. 497 F.2d at 341 (emphasis added).

33. *See, e.g.*, Kaufman v. Shoenberg, 154 F. Supp. 64, 67 (D. Del. 1954). Moreover, the district court in *Thristlethwaite* had applied claim rather than issue preclusion, *see* note 29 *supra*, and had not actually determined which issues had been raised in the state court. Thus, if the court of appeals really intended to apply issue preclusion, it would have realized that the record was not adequately developed, and remanded the case to the district court for an evidentiary hearing to establish exactly which issues had been decided in the state proceeding. *See* Williams v. Liberty, 461 F.2d 325, 328 (7th Cir. 1972); Kauffman v. Moss, 420 F.2d 1270, 1276 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970).

34. *See* text accompanying note 30 *supra*.

that the majority rested its result on an application of issue preclusion even though that result seems more consistent with the rationale of claim preclusion.

A further indication of the majority's confusion is that it failed to advance any justification for the application of issue rather than claim preclusion. In this regard, Judge Oakes suggested a lack of strict mutuality of parties.[35] According to the mutuality requirement, a party is entitled to the benefit of claim preclusion only if he would have been bound by the prior judgment had it gone the other way.[36] Although the prosecutors of the state criminal proceeding were not identical to the defendants in the federal civil rights suit (the city and several individual city officials), it seems that the interests of the *Thistlethwaite* defendants were so closely related to the constitutional considerations involved in the state criminal proceeding that the court could properly have considered them to be in privity with the state for the purpose of determining the preclusive effect of the state judgment.[37] Thus, lack of mutuality would not by itself appear to be a sufficiently strong justification under the facts of *Thistlethwaite* for the application of issue rather than claim preclusion.

Ultimately, the most convincing argument for the application of issue preclusion in *Thistlethwaite* would have been that upon proper differentiation of first amendment issues the claims in the two proceedings would have been found functionally and factually different.[38] As Judge Oakes observed:

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35. 497 F.2d at 343 n.1.

36. *See* United States v. Harrison County, 399 F.2d 485, 491 (5th Cir. 1968), *cert. denied*, 397 U.S. 918 (1970); JAMES § 11.31, at 595. Although mutuality historically was required for issue as well as claim preclusion, courts have increasingly applied issue preclusion in certain situations where traditional mutuality has been found to be lacking. Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. 313, 349-50 (1971). *See* JAMES §§ 11.31, 11.34, at 595, 599. In particular, the Court of Appeals for the Second Circuit has previously taken the position that, regardless of the lack of mutuality, issue preclusion may be used *defensively*, as in *Thistlethwaite*, against a party who has fully litigated the issue in a prior action. Zdanok v. Glidden Co., 327 F.2d 944, 955-56 (2d Cir. 1964); Spatt v. New York, 361 F. Supp. 1048, 1051 n.2 (E.D.N.Y.), *aff'd*, 414 U.S. 1058 (1973). *See also* Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25, 30-33 (1965).

37. *See* Spatt v. New York, 361 F. Supp. 1048, 1051 n.2 (E.D.N.Y.), *aff'd*, 414 U.S. 1058 (1973) (Commissioner of Education, Governor, Comptroller, and Department of Education considered in privity with state although not parties to first action).

38. There are several theories concerning the proper definition of a claim for the purpose of determining the scope of claim preclusion, *see* JAMES § 11.10, at 553-54, and courts exercise some discretion over the

> [I]t simply is not the same question whether an ordinance requiring permits is unconstitutionally applied by screening applicants by the content of their leaflets or is unconstitutional on its face so as to void the conviction of one who never knew of or applied for a permit to distribute.[39]

Since the first amendment issues represented by the first two modes of attack were distinct from those represented by the third and fourth modes,[40] appellants should not have been precluded from litigating the latter modes of attack in federal court. Furthermore, as Judge Oakes also noted, the preclusion resulted in no real gain in either judicial economy or federal-state comity, inasmuch as the court's insensitivity to distinctions in the first amendment issues may well result in "one case to determine whether there is collateral estoppel [issue preclusion]; [and] another to raise the issue [on the merits], regardless of the outcome of the first, for inevitably there are numbers of potential plaintiffs willing to test such laws . . . ."[41] Meanwhile, the *Thistlethwaite* appellants are abandoned to the mercies of the permit administrators.

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choice of a theory in any particular set of circumstances. *See* Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations*, 53 VA. L. REV. 1360-61, 1371-75 (1967). The theory which yields the most inclusive definition is based upon an examination of factual content: if two respective groups of operative facts should reasonably be treated as a unit, then the claims are said to be the same. JAMES § 11.10, at 554. Thus, since the fourth mode of attack would be based upon events which had occurred after the conclusion of the state proceeding, *see* notes 27-28 *supra* and accompanying text, the claims in the state and federal suits were distinct under even the broadest definition of a "claim." But the majority overlooked these events, commenting that the state court had "appl[ied] the regulation in question to facts identical to those presently alleged . . . ." 497 F.2d at 342.

39. *Id.* at 345.

40. *See* notes 14-28 *supra* and accompanying text.

41. 497 F.2d at 345.